BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAWN BRUMBAUGH	)	
Claimant	)	
VS.	)	
	)	Docket No. 261,507
ATRIA HEARTHSTONE	)	
Respondent	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 4, 2002 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded a 46.25 percent permanent partial general disability based upon a 37.5 percent task loss and a 55 percent wage loss. Claimant argues the award should be increased to a 53.56 percent permanent partial general disability. Respondent contends claimant's award should be reduced to show a task loss of 21.8 percent and a wage loss of 42 percent, for a 31.9 percent permanent partial general disability. Respondent further argues as of September 5, 2002, claimant's wage loss would drop to 36 percent, which, when combined with her 21.8 percent task loss, would result in a 28.9 percent permanent partial general disability. The Appeals Board (Board) heard oral argument on June 3, 2003. Gary M. Peterson appeared as Appeals Board Member Pro Tem for the purposes of this appeal.[1]

APPEARANCES

Claimant appeared by her attorney, Frederick J. Patton, II, of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard W. Morefield, Jr., of Kansas City, Missouri.

---

[1] Board Member Gary M. Peterson retired from the Board in March 2003. As of the date of oral argument, no replacement had been named.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

(1) What was claimant's average weekly wage on the date of accident?

(2) What is claimant's post-accident average weekly wage while working for Wal-Mart?

(3) What is the nature and extent of claimant's injury and disability, including what, if any, wage loss and task loss claimant may have suffered as a result of the injuries on November 10, 2000?

(4) Was there an underpayment of temporary total disability compensation paid to claimant?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant worked as a certified nurses aide for respondent beginning December 23, 1999. On November 10, 2000, while assisting a resident to the bathroom, claimant suffered an injury to her low back when the resident started to fall and claimant tried to catch her. Claimant sought medical treatment at the emergency room of Stormont-Vail Health Center on November 13. She then was examined by her personal physician Lori L. Stonehocker, D.O., on November 15, 2000, and claimant was taken off work at that time and referred to Craig L. Vosburgh, M.D. She was then referred to John A. Magnotta, M.D., seeing him on January 29, 2001, and from Dr. Magnotta, referred to Florin Nicholae, M.D., who did epidural injections in claimant's spine. An MRI, ordered by Dr. Magnotta and performed on March 9, 2001, displayed a right side L5-S1 disc herniation.

Claimant was referred to orthopedic surgeon Michael L. Smith, M.D., who performed a hemilaminectomy with excision of a right HNP on September 17, 2001. Claimant postoperatively had significant improvement, although she continued to have some low back pain. She underwent a functional capacity evaluation and was ultimately returned to work with a maximum lift restriction of 20 pounds.

Claimant was paid 64 weeks temporary total disability compensation for the period from November 15, 2000, through February 7, 2002. The temporary total disability compensation was paid at the rate of $212.80 per week.

Claimant began working at Wal-Mart as a customer service manager on March 5, 2002. Claimant started at Wal-Mart, earning $6.50 per hour. She later received a raise to $7.10 an hour, with claimant alleging the raise occurred on August 29, 2002. Erica Davis, the assistant manager at Wal-Mart, testified that claimant would have received a raise to $7.10 sometime in June of 2002, but does not give a specific date.

At the time of the regular hearing, claimant continued working for Wal-Mart. According to Ms. Davis, claimant was only working 28 hours per week. Ms. Davis testified that a normal full-time employee would be expected to work at least 34 hours per week. She testified that claimant was working less than the normally expected hours per week because claimant was having difficulties with her pregnancy. She was using sick time for the pregnancy complications.

Claimant earlier testified that she was making $7.98 per hour working for respondent and working a 40-hour week. The parties dispute the number of hours claimant worked for respondent and the amount of fringe benefits she was being provided from respondent. However, a stipulation regarding claimant's wage and fringe benefits was signed by both attorneys and filed with the Division in November 2002. This stipulation displays not only the fringe benefits provided by respondent on claimant's behalf, but also breaks down the amount of fringe benefits cost paid by claimant and the amount paid by respondent on a monthly basis. The stipulation also contains a list of claimant's wages paid for the 26 weeks preceding the November 10, 2000 accident, showing both regular and overtime wages.

Claimant testified that she worked 40 hours per week on a regular basis for respondent. The evidence in the stipulated documentation does show that claimant worked 40 hours plus on several occasions, although not on a regular basis. However, claimant's testimony that she was a full-time hourly employee, expected to work 40 hours per week, is uncontradicted.

Claimant's average weekly wage while employed with respondent computes to $457.28. This is comprised of straight time pay of $7.98 per hour times 40 hours per week, totaling $319.20. The stipulation provided by the parties shows fringe benefits provided by respondent in the amount of $105.04, for a total of $424.24. In addition, claimant testified that she was paid a $1,000 bonus during the year prior to her accident. This computes to a $19.23 per week addition to the wage. And finally claimant worked overtime, averaging $13.81 per week during the 26 weeks preceding her accident.

After claimant began working for Wal-Mart, she was earning $6.50 per hour, working 30 hours per week. However, the testimony of Ms. Davis is convincing that claimant was hired with the expectation that she would work 34 hours per week at a minimum. The Board, therefore, finds that claimant initially had an average weekly wage with Wal-Mart of $221 per week. As of August 29, 2002, claimant's hourly rate was increased to $7.10 per hour, which computes to a weekly wage of $241.40.

As of September 5, 2002, six months after claimant began her employment with Wal-Mart, claimant became eligible for fringe benefits. Ms. Davis testified that claimant, when offered the benefits, declined. Claimant testified that she could not afford those benefits. The amount of respondent-provided fringe benefits, including both medical insurance and dental coverage, computes to $127.50 per week.

Based upon the above information, the Board finds claimant had an average weekly wage with Wal-Mart of $221 per week through August 28, 2002. This represents a wage loss of 52 percent when compared to the $457.28 wage computed above. As of August 29, 2002, with claimant's raise to $7.10 per hour, her weekly wage increased to $241.40. This computes to a 47 percent wage loss when compared to her average weekly wage with respondent.

Claimant was referred to Phillip L. Baker, M.D., board certified in orthopedic surgery and sports medicine, for an evaluation at respondent's request on February 27, 2002. Dr. Baker diagnosed claimant, post surgery, with a 10 percent permanent partial impairment to the body as a whole based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He placed claimant on a 20-pound lifting restriction. Dr. Baker was provided a task list prepared by vocational expert Karen Crist Terrill. This task list contained thirty-two non-duplicative tasks, of which Dr. Baker opined claimant was incapable of performing seven, for a 22 percent task loss.

Claimant was referred by her attorney to Daniel D. Zimmerman, M.D., for an examination on March 8, 2002. Dr. Zimmerman assessed claimant a 14 percent permanent partial impairment to the body as a whole, resulting from the discectomy at L5-S1. His opinion was also based upon the AMA *Guides* (4th ed.). He placed restrictions on claimant of lifting 20 pounds on an occasional basis, 10 pounds on a frequent basis and advised that she should avoid frequent flexing of the lumbosacral spine and also avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities.

Dr. Zimmerman was also shown the task list prepared by Ms. Terrill and opined that claimant was incapable of performing eighteen of the thirty-two tasks on the list, for a 56 percent task loss. The Administrative Law Judge, in reviewing the task opinions, noted that claimant had testified to being required to lift 80-pound food trays while working for certain restaurants. The Administrative Law Judge discounted this testimony, finding it to

be unrealistic. He did not count that as a task claimant was incapable of performing. He then averaged the task loss opinions of Drs. Baker and Zimmerman, arriving at a task loss of 37.5 percent.

The Board finds that opinion of the Administrative Law Judge to be appropriate and affirms claimant's task loss of 37.5 percent.

K.S.A. 44-510e defines "permanent partial general disability" as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the percentage of permanent partial general disability shall not be less than the percentage of functional impairment.

In order to properly compute claimant's permanent partial general disability under K.S.A. 44-510e, there must also be a determination made regarding what, if any, wage loss claimant may have suffered. But K.S.A. 44-510e must be read in the light of both *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

In this instance, respondent was unable to accommodate the restrictions placed upon claimant by both Dr. Zimmerman and Dr. Baker. Claimant was paid temporary total disability compensation through February 7, 2002, a total of 64 weeks. Claimant was then successful in obtaining employment by March 5, 2002, at Wal-Mart. The Board finds claimant's success at obtaining employment less than a month after being taken off temporary total disability compensation constitutes a good faith effort on claimant's part and, rather than imputing a wage, the Board will, in part, use claimant's actual earnings to determine what, if any, wage loss claimant has suffered. However, the Board notes that

---

[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

claimant was hired to work 34 hours per week at a minimum based upon the testimony of Ms. Davis. Claimant's reduced hours were self-imposed, caused, in part, by claimant's difficult pregnancy and "other things." The Board will, therefore, impute to claimant a 34-hour per week work week when computing her post-injury wage at Wal-Mart.

The Board finds for the period March 5, 2002, through August 29, 2002, that claimant was earning $221 per week based upon a $6.50 per hour wage and 34 hours per week. This constitutes a 52 percent wage loss which, when compared to claimant's 37.5 percent task loss, results in a work disability of 44.75 percent. As of August 29, 2002, when claimant's hourly rate increased to $7.10 per hour, claimant's wage increased to $241.40 per week, resulting in a 47 percent wage loss, resulting in a work disability of 42.25 percent. As of September 5, 2002, claimant became eligible for benefits through Wal-Mart. Claimant refused those benefits as she was unable to afford the added deduction from her wages. The Board does not find claimant's inability to afford those benefits to show a lack of good faith on her part or an attempt on claimant's part to manipulate her workers' compensation claim. Therefore, the employer's cost to provide its portion of those benefits will not be imputed in claimant's post-injury average weekly wage.

Due to the accelerated payout created under K.S.A. 44-510e with the 1993 revisions to the statute, the Board need not calculate each change in wage loss. Instead, we need only compute claimant's award based on the 42.25 percent permanent partial general disability. The multiple modifications of claimant's award over a relatively short period of time ultimately result in no change to claimant's total benefit.

Claimant argues that she was underpaid temporary total disability compensation for the 64 weeks during which she received benefits. The stipulation regarding wages and fringe benefits filed by the attorneys included a November 8, 2002 letter from Debbie McDonald, the respondent's benefits administrator. In that letter, Ms. McDonald identified claimant as being employed by respondent from December 23, 1999, until March 9, 2001. There is no indication in the record other than this letter as to when claimant's fringe benefits with respondent were terminated. The Board, therefore, finds as of March 10, 2001, claimant's average weekly wage would include the fringe benefits of $105.04. Therefore, for the weeks from November 15, 2000, through March 9, 2001, claimant's temporary total disability compensation is due at the rate of $212.81 per week based upon claimant's straight time hourly rate of $7.98 per hour and at a 40-hour week. Effective March 10, 2001, with the inclusion of the fringe benefits and weekly bonus and overtime, claimant's temporary total rate increases to $304.87 per week. The period from November 15, 2000, through March 9, 2001, constitutes 16.29 weeks at $212.81 per week, totaling $3,466.67. Claimant would thereafter be entitled to 47.71 weeks temporary total disability compensation at the increased rate of $304.87, totaling $14,545.35, for a total due and owing for temporary total disability compensation of $18,012.02. This results in an underpayment of $4,392.18.

The Board, therefore, finds that the Award of the Administrative Law Judge Brad E. Avery dated December 4, 2002, should be modified to award claimant a permanent partial general disability of 42.25 percent to the body as a whole for the injuries suffered on November 10, 2000.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated December 4, 2002, should be, and is hereby, modified, and an award in granted in favor of the claimant, Dawn Brumbaugh, and against the respondent, Atria Hearthstone, and its insurance carrier, Old Republic Insurance Company, for an injury occurring on November 10, 2002, and based ultimately on an average weekly wage of $457.28 for a 42.25 percent permanent partial general disability.

Claimant is entitled to 16.29 weeks temporary total disability compensation at the reduced rate of $212.81 per week totaling $3,466.67, followed by 47.71 weeks temporary total disability compensation at the increased rate of $304.87 per week totaling $14,545.35, for a total of $18,012.02 in temporary total disability compensation. Claimant is then awarded 154.64 weeks permanent partial general disability compensation at the rate of $304.87 per week totaling $47,145.10, for a total award of $65,157.12.

As of October 1, 2003, claimant is entitled to 16.29 weeks temporary total disability compensation at the rate of $212.81 per week totaling $3,466.67, followed thereafter by 47.71 weeks temporary total disability compensation at the rate of $304.87 per week totaling $14,545.35, for a total temporary total disability compensation due of $18,012.02. Claimant is thereafter entitled to 86.71 weeks permanent partial general disability compensation at the rate of $304.87 per week totaling $26,435.28, for a total due and owing of $44,447.30 which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 67.93 weeks permanent partial general disability compensation at the rate of $304.87 per week totaling $20,709.82 until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frederick J. Patton, II, Attorney for Claimant
Richard W. Morefield, Jr., Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Director